

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSEPH and ADAM SMITH,

Plaintiffs,

v.

RESULT MATRIX, INC., et al.

Defendant/Cross
Claimant,

v.

DALE PEROZZO,

Cross Defendant.

CASE NO. C21-5380-BHS-SKV

ORDER RE: RMI MOTION TO
EXCLUDE OR LIMIT EXPERT
TESTIMONY AND REPORT

INTRODUCTION

Plaintiffs Joseph and Adam Smith bring claims against Defendant Result Matrix, Inc. (RMI) under the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681, *et seq.* Dkt. 1. Now pending before the Court is RMI's Motion to Exclude, or Limit, Proffered Testimony and Report of Evan D. Hendricks. Dkt. 35. Plaintiffs oppose RMI's motion. Dkt. 40.¹ The Court, having

¹ Plaintiffs also filed a surreply, asking the Court to strike certain false and impertinent statements in RMI's reply brief. Dkt. 46. Plaintiffs identify as false RMI's statement that, in listing cases in which Hendricks testified, "the most recent case [Plaintiffs cite] was filed in 2012, a full decade ago." Dkt. 42 at 4:17-19. Because Plaintiffs demonstrate the inaccuracy of this statement, *see* Dkt. 46 at 2 & Dkt. 40 at 6-7 (citing, *inter alia*, *Sponer v. Equifax Info. Servs., LLC*, No. C17-2035 (D. Or. Aug. 8, 2019) (Dkt. 123 at 3 & Dkt. 152 at 118-66)), this request to strike is GRANTED. However, the other requests are DENIED.

1 considered the briefing filed in support and in opposition to the motion, along with the remainder
2 of the record, herein finds and concludes as follows.

3 BACKGROUND

4 This matter involves RMI's issuance of "mixed file" consumer reports in relation to
5 Plaintiffs, meaning reports containing information belonging to individuals other than Plaintiffs.
6 *See* Dkt. 1.² In this instance, the other individuals included in the reports had criminal histories
7 as sex offenders. *Id.* Plaintiffs allege RMI violated the FCRA through the publication of
8 incorrect information, leading to, among other things, the rejection of their application to rent
9 property. Plaintiffs also allege RMI violated the FCRA in failing to disclose all of the
10 information in their credit files at the time of their request for the same. In support of these
11 claims, Plaintiffs seek to present an expert witness report and testimony from Evan D.
12 Hendricks. *See* Dkt. 35-1. RMI, in the motion currently before the Court, seeks to exclude or
13 limit the proffered expert evidence.

14 DISCUSSION

15 Federal Rule of Evidence 702 governs the admissibility of expert testimony. Under that
16 rule, expert testimony is admissible if "the expert's scientific, technical, or other specialized
17 knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."
18 Fed. R. Evid. 702(a). An expert's opinion testimony must be helpful to the trier of fact, based on

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20 The Court does not find RMI's reference to cases in which Hendricks was excluded from testifying to be
21 impertinent. *See infra* n.4. Nor did RMI inaccurately depict Plaintiffs' responsive brief as untimely.
22 Pursuant to Local Civil Rule (LCR) 7(d)(3), Plaintiffs should have filed their opposition to RMI's
23 nondispositive motion no later than the Monday prior to the noting date. *Johnson v. Allstate Fire & Cas.*
24 *Ins. Co.*, No. C11-1541-MJP, 2012 WL 13028542, at *1 (W.D. Wash. June 28, 2012). *Cf.* LCR 7(d)(2)
(filing deadlines applicable to motions for relief from a deadline and for protective orders). The Court
nonetheless considers Plaintiffs' brief, while advising that any future untimely filings may be stricken.

² RMI issued the consumer reports through its subsidiary Straight Arrow Screening. *See* Dkt. 1,
¶¶ 2.6, 4.14 and Dkt. 35-2, ¶7. Unless otherwise necessary, the Court herein refers only to RMI.

1 sufficient facts or data, based on reliable principles and methods, and result from a reliable
2 application of the principles and methods to the facts of the case. Fed. R. Evid. 702(a)-(d).

3 As explained by the United States Supreme Court, Rule 702 “assign[s] to the trial judge
4 the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant
5 to the task at hand.” *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993). The
6 district court performs a “gatekeeping role,” determining whether the proffered evidence is: (1)
7 reliable, i.e., whether the expert’s testimony reflects scientific knowledge, the findings are
8 derived by the scientific method, and the work product amounts to ““good science””; and (2)
9 relevant, i.e., “that it logically advances a material aspect of the proposing party’s case.”
10 *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1315-16 (9th Cir. 1995) (“*Daubert II*”)
11 (quoting and citing *Daubert*, 509 U.S. at 590, 593-94, 597). This gatekeeping obligation extends
12 to all expert testimony, not only testimony based on scientific knowledge. *Kumho Tire Co., Ltd.*
13 *v. Carmichael*, 526 U.S. 137, 141 (1999). The basis for expert testimony may therefore rest on
14 personal knowledge or experience. *Id.* at 150.

15 The district court has broad discretion to assess the relevance and reliability of expert
16 testimony. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 141-43 (1997) (district court decisions
17 are reviewed for abuse of discretion); *United States v. Alatorre*, 222 F.3d 1098, 1104-05 (9th Cir.
18 2000) (describing a district court’s latitude over both the decision to admit expert testimony and
19 with respect to the procedures by which to assess reliability). The proponent of expert testimony
20 bears the burden of establishing admissibility by a preponderance of the evidence. *Daubert*, 509
21 U.S. at 592 n.10 (citing *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987)).

22 In asserting Hendricks’ expertise, Plaintiffs note his admission as an expert on credit
23 reporting and privacy issues by courts around the country, his recognition as an expert in the
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1 credit reporting industry by the Federal Trade Commission, Congress, and major credit reporting
2 agencies, and his publications on credit reporting and privacy issues. *See* Dkt. 35-1. Plaintiffs
3 argue expert evidence from Hendricks is necessary to help the jury understand the inner
4 workings of the credit reporting industry and to place Plaintiffs' experience within the context of
5 RMI's policies and procedures and in relation to other mixed file cases.

6 RMI seeks to exclude or, alternatively, to limit the proffered expert report and testimony.
7 Specifically, RMI argues Hendricks is not qualified to serve as an expert in this case, that his
8 opinions are legally deficient in failing to identify sufficient facts or data considered, that the
9 opinions in the expert report are inadmissible, and that he should not be allowed to testify
10 regarding damages.

11 A. Qualifications

12 RMI argues Hendricks lacks adequate qualifications, such as industry experience,
13 training, or relevant education, to serve as an expert in this case. It depicts his alleged expertise
14 as insufficiently based on the fact others have hired him to serve as an expert and points to cases
15 in which courts have limited his testimony. *See, e.g., Reilly v. Vivint Solar*, No. C18-12356,
16 2020 WL 3047546, at *4 (D. N.J. June 8, 2020) (precluding Hendricks' testimony as to
17 damages). RMI argues that, should the Court find Hendricks to have any useful expertise, it
18 should limit his testimony to a generalized description of the credit reporting process. *See, e.g.,*
19 *Zabriskie v. Fed. Nat'l Mortg. Ass'n*, No. C13-2260, 2016 WL 3653512, at *2 (D. Ariz. Apr. 22,
20 2016) (allowing Hendricks' testimony "regarding the relevant industry standards for
21 characterizing and reporting consumer credit data or describing how Fannie Mae's procedures
22 comport with these standards[,] but not an "opinion as to whether these procedures should be
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1 considered ‘unreasonable’ under the FCRA, because this is an ultimate issue that will be decided
2 by the jury.”) (citations omitted).

3 Numerous courts have found Hendricks qualified to offer expert evidence in cases
4 involving the FCRA and credit reporting. *See, e.g., Brown v. Vivint Solar, Inc.*, No. C18-2838,
5 ____F. Supp. 3d ____, 2020 WL 1479079, at *2 (M.D. Fla. Mar. 26, 2020) (finding Hendricks
6 “qualified to testify about the FCRA generally and credit reporting issues” and as to “the
7 industry standards for preventing privacy invasions, as well as comparing Defendants’ conduct
8 to industry standards”); *Reilly*, 2020 WL 3047546, at *2-3 (finding Hendricks “qualified to
9 provide testimony as to the basics of credit reporting and credit data privacy, and the policies
10 used in the industry relevant thereto[,]” including “the issues of industry standards for data
11 privacy policies as they relate to credit inquiries.”); *Cramer v. Equifax Info. Servs.*, No. C18-
12 1078, 2019 WL 4468945, at *3 (E.D. Mo. Sept. 18, 2019) (“As an industry expert, Mr.
13 Hendricks may testify about the relevant industry practices for reporting and investigating
14 consumer credit data, . . . , the relevant practices for reporting accurate credit data, and how Bay
15 Area’s actions in connection with plaintiff’s credit dispute comport with those industry
16 standards.”) *See also* Dkt. 35-1 at 11-30 (listing cases in which Hendricks has testified at trial or
17 been deposed as an expert). His knowledge and experience extends to mixed file cases. *See,*
18 *e.g., Valenzuela v. Equifax Info. Servs. LLC*, No. C13-2259, 2015 WL 6811585, at *2 (D. Ariz.
19 Nov. 6, 2015) (finding Hendricks qualified to offer testimony in a mixed file case); *Miller v.*
20 *Equifax Info. Servs., LLC*, No. C11-1231, 2014 WL 2123560, at *2 (D. Or. May 20, 2014)
21 (noting Hendricks “testified about other mixed-file cases in which juries had found Equifax
22 violated FCRA”).

23 As described by more than one court:
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1 For thirty-three years, Hendricks researched, wrote, edited, and published a bi-
2 weekly newsletter covering various aspects of the FCRA. For ten years, he
3 served as a privacy expert consultant for the Social Security Administration,
4 where he reviewed policies and practices regarding use and disclosure of personal
5 data. Hendricks also has a FCRA certification from the National Credit Reporting
6 Association. Additionally, Hendricks has testified about the FCRA and related
7 matters before the United States House Financial Services Committee and Senate
8 Banking Committee, and has been admitted as an expert witness to testify on
9 similar matters in both state and federal courts. These experiences qualify
10 Hendricks to offer expert witness testimony [on] certain topics in this case.

11 *Cramer*, 2019 WL 4468945, at *3 (quoted cases and quotation marks omitted). *See also Reilly*,
12 2020 WL 3047546, at *4 (“... Hendricks’ curriculum vitae reveals he has been actively engaged
13 in the privacy industry, through consulting roles and otherwise, for more than thirty years. Both
14 the United States Senate and House of Representatives have relied upon his testimony, as have a
15 number of courts throughout the country. He has consulted for large governmental organizations
16 on privacy policy implementation and review. Hendricks represents that the methodology
17 behind his opinions flows from this experience; the Court agrees.”) There is, indeed, little
18 question that “Hendricks has done more than simply accumulate experience testifying.”
19 *Valenzuela*, 2015 WL 6811585, at *2 n.1.

20 Considering the evidence of his extensive knowledge and some forty years of relevant
21 experience, *see* Dkt. 35-1, this Court likewise finds Hendricks qualified to offer an expert report
22 and testimony in relation to the FCRA and this case. That is, the Court concludes that
23 Hendricks’ specialized knowledge on the FCRA, credit reporting agencies and processes,
24 industry standards, mixed files, and other matters pertinent to this case will help the trier of fact
to understand the evidence and to determine facts at issue. *See, e.g., Zabreskie*, 2016 WL
3653512, at *2 (“A layperson is not likely to have independent knowledge of the intricacies of
how consumer reports are typically interpreted and Mr. Hendricks’s specialized knowledge on

1 this topic will assist the trier of fact.”) The Court separately addresses below RMI’s challenges
 2 to the specific opinions in the expert report.

3 B. Facts or Data Considered

4 A testifying expert witness must provide a report disclosing “the facts or data considered
 5 by the witness in forming” the expert’s opinions. Fed. R. Civ. P. 26(a)(2)(B)(ii); *see also Biestek*
 6 *v. Berryhill*, ___ U.S. ___, 139 S.Ct. 1148, 1154 (2019) (“[A]n expert witness must produce all data
 7 she has considered in reaching her conclusions.”); Fed. R. Evid. 702(b) (expert’s opinion must be
 8 “based on sufficient facts or data”). The obligation to disclose “extends to any facts or data
 9 ‘considered’ by the expert in forming the opinions to be expressed, not only those relied upon by
 10 the expert.” Fed. R. Civ. P. 26(a)(2)(B) advisory committee’s note to 2010 Amendment. Where
 11 a party fails to comply with Rule 26 disclosure obligations, “the party is not allowed to use that
 12 information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the
 13 failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1).

14 RMI argues that Hendricks’ expert report is legally deficient under Rule 26(a)(2)(B)(ii)
 15 given his failure to identify the “facts or data” he considered in forming his opinions. Fed. R.
 16 Civ. P. 26. It points to the report as listing only Plaintiffs’ Complaint and unidentified
 17 “Documents Produced by Plaintiffs and Defendant, as of the date of this report.” Dkt. 35-1 at
 18 34. RMI observes that it has not yet been deposed or furnished Plaintiffs with any documents
 19 describing its internal business practices. *See* Dkt. 35 at 2, n.3 (stating that, while Plaintiffs
 20 served discovery requests, they have never followed up on any of RMI’s objections) and at 9, n.7
 21 (“Plaintiffs have not deposed RMI. RMI has not furnished plaintiffs with any of its internal
 22 control documents that would either address or ignore the issue of mixed files.”) RMI argues
 23 that, given the failure to comply with Rule 26(a)(2)(B)(ii), the reliability and quality of the expert
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1 report cannot be evaluated. It contends that, on this basis alone, the Court should not permit the
2 expert report to be entered into evidence or to stand as the basis for Hendricks' opinion
3 testimony.

4 The expert report indicates that Hendricks reviewed the Complaint, documents produced
5 by the parties as of the date of the report, and, for foundational purposes, the FCRA and
6 publications on the FCRA and credit reporting. Dkt. 35-1 at 34. The report also contains
7 citations to other publications, case law, a consent order, and a document on RMI's website
8 providing a "Summary of Rights" under the FCRA. Dkt. 35-1 at 32-33; *see also id.* at 37-40.

9 In responding to the motion to exclude, Plaintiffs provide a copy of the consumer reports
10 RMI generated in relation to Plaintiffs, as produced in initial disclosures by Cross Defendant
11 Dale Perozzo. *See* Dkt. 40-1, ¶3 & Dkt. 40-2. Plaintiffs also assert that Hendricks, through his
12 role as an expert witness in numerous cases, has reviewed "countless deposition transcripts from
13 employees of credit reporting agencies[]" and "examined thousands of pages of the agencies'
14 internal documents." Dkt. 40 at 9.

15 Plaintiffs do not directly respond to RMI's argument as to the specific facts or data relied
16 upon by Hendricks. The Court therefore lacks information as to the documents disclosed by the
17 parties and considered by Hendricks in rendering his opinions. To the extent his opinions rest on
18 his expertise in relation to the credit reporting industry as a whole, the report is sufficiently
19 supported under both Rule 26 and Rule 702. However, outside of Hendricks' review of the
20 consumer reports at the center of this litigation and RMI's "Summary of Rights", the basis for
21 his knowledge as to RMI's practices or procedures is unknown. *Cf. Valenzuela*, 2015 WL
22 6811585, at *3 (finding Hendricks "qualified to discuss Equifax's 'inner workings' because of
23 his experience with credit reporting agencies, including his expert witness experience in previous
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1 Equifax cases[]” and that Equifax could explore any inaccuracies in his testimony on cross-
2 examination). The Court, as such, agrees with RMI that Hendricks may not offer expert opinions
3 as to RMI’s practices and procedures unless he identifies sufficient facts or data to support those
4 opinions.

5 The Court is not, however, persuaded that the proper remedy for this deficiency is to
6 exclude all evidence based on and derived from the expert report. Instead, the still early
7 procedural posture of this case warrants providing Plaintiffs the opportunity to submit a revised
8 expert report, supplemented with any evidence obtained through discovery and otherwise
9 compliant with Rule 26(a)(2)(B)(ii) and Rule 702.³

10 C. Hendricks’ Opinions

11 In the “Opinion-Summary” section of the expert report, Hendricks sets forth seven
12 opinions. *See* Dkt. 35-1 at 31-32. RMI argues all seven opinions are flawed.

13 In the first opinion, Hendricks describes a mixed file as a well-known and long-standing
14 cause of consumer report inaccuracy, defines a mixed file as a “Consumer Report in which
15 some or all of the information pertains to a person or persons other than the person who is the
16 subject of the Consumer Report[,]” and states that a “well-known and long-standing cause of
17 mixed files is similarity of key identifiers such as name.” *Id.* at 31. RMI questions the basis for
18 Hendricks’ opinion that RMI’s consumer reports on Plaintiffs were “mixed files”, noting the
19 record does not demonstrate Hendricks ever reviewed the reports. It is, however, undisputed the
20 consumer reports generated by RMI identified criminal violations, specifically convictions for
21 sexual offenses, attributable to other individuals with the same first and last names as Plaintiffs.

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23 ³ The parties have until July 19, 2022 to complete discovery, Dkt. 22, and the Court recently granted RMI’s
24 motion to extend the deadline for the submission of its rebuttal expert witness report until after the Court considers
its motion to exclude, Dkt. 39

1 See Dkt. 26 (RMI's Amended Cross Complaint), ¶¶2.7-2.9, 3.2. Moreover, in making
2 determinations of fact, the jury will consider the consumer reports. Dkt. 40-1, ¶3 & 40-2.
3 Hendricks' knowledge regarding mixed files, as set forth in the first opinion, will aid the jury in
4 understanding this case. *Valenzuela*, 2015 WL 6811585, at *2 (concluding Hendricks could
5 testify "about the indicia of a mixed file, typical and best practices for identifying and correcting
6 a mixed file, and the FCRA's standards for correcting a mixed file[.]" that this information was
7 neither common sense, nor within a layperson's independent knowledge, and that Hendricks'
8 specialized knowledge would assist the trier of fact).

9 In the second opinion, Hendricks opines it is "incumbent upon consumer reporting
10 agencies ('CRAs') to have procedures in place to guard against and/or prevent mixed files."
11 Dkt. 31-1 at 31. RMI argues Hendricks is not qualified to offer this opinion because he lacks
12 industry experience, training, or relevant education. The Court disagrees and finds Hendricks
13 qualified to offer expert testimony on this issue. Moreover, as with the first opinion, Hendricks'
14 opinion as to industry standards relating to mixed files will assist the trier of fact.

15 Hendricks states as follows in his third, fourth, and fifth opinions: (1) that Plaintiffs
16 "became victims" of mixed files because RMI lacked adequate procedures to prevent mixed
17 files; (2) that RMI "caused profound inaccuracies because it was willing to mix other people's
18 criminal history information into Plaintiffs' consumer reports based on exceedingly permissive
19 and loose data-matching criteria", by relying on no more than a partial name-match or possibly a
20 match by date or year of birth, "even though Plaintiffs' last name, 'Smith,' was one of the most
21 common names in the United States."; and (3) that RMI's conduct in this case reflected its
22 disregard of both "decades of notice to the consumer reporting industry that exceedingly
23 permissive and loose data-matching criteria causes mixed files and inaccuracy[.]" and "the need
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1 to base its data-matching on a sufficient number of identifiers including Social Security Numbers
2 ('SSNs') and actual dates-of-birth ('DoBs'), particularly when the data subject has a common
3 name, like Smith." Dkt. 35-1 at 31. RMI deems each of these opinions speculative and
4 unreliable because Plaintiffs did not obtain and Hendricks did not have any evidence of RMI's
5 internal procedures or practices, including any information about its internal data management
6 procedures to guard against inaccuracy. RMI also argues that Hendricks ignores the fact
7 "virtually no" public records include SSNs. Dkt. 35-2, ¶5.

8 Again, Hendricks may offer expert evidence in relation to mixed files based on his
9 knowledge of and experience with industry standards. As addressed above, Hendricks may not
10 offer expert opinions as to RMI's practices and procedures unless he identifies sufficient facts or
11 data to support those opinions. Thus, to the extent he explains the specific bases for his
12 knowledge, how he applied his knowledge and experience to the facts at hand, and how that
13 application yields his opinions, he may testify as to RMI's practices and procedures, its acts or
14 omissions in this case, and a comparison to industry standards. *See, e.g., Malverty v. Equifax*
15 *Info. Servs., LLC*, No. C17-1617, 2019 WL 5549146, at *2-3 (M.D. Fla. Oct. 28, 2019) (allowing
16 Hendricks' testimony "about what additional measures Equifax could have taken to ensure the
17 accuracy of [the] consumer report," including "whether Equifax's 'procedures match industry
18 standards if he dissects the basis for his knowledge of industry standards, explains how he
19 applied his experience to the facts and how such application yields his opinion.'") (citations
20 omitted); *Zabriskie*, 2016 WL 3653512, at *2 (allowing Hendricks' testimony "regarding the
21 relevant industry standards for characterizing and reporting consumer credit data or describing
22 how Fannie Mae's procedures comport with these standards."); *Williams v. First Advantage LNS*
23 *Screening Sols. Inc.*, No. C13-0222, 2015 WL 9690018, at *4 (N.D. Fla. Mar. 31, 2015) ("Mr.

1 Hendricks conveyed prevailing industry norms that do utilize additional identifiers based on his
2 extensive experience with the industry. This type of information is useful to the jury because it
3 allows them to infer from such widespread practice that industry players believe increasing the
4 number of individual identifiers strengthens the accuracy of the consumer reports. It provides . . .
5 a benchmark by which the jury can assess whether Defendant’s methods are reasonable.”)
6 Hendricks may, for example, opine as to the ways in which the specific consumer reports at issue
7 in this case do or do not comport with industry standards. RMI may challenge that testimony
8 through cross examination.

9 Hendricks may not, on the other hand, offer mere speculation. *Reilly*, 2020 WL
10 3047546, at *6; *Brown*, 2020 WL 1479079, at *4. Nor may he offer conclusions drawn from his
11 own interpretation of the facts, such as that Plaintiffs “became victims” or the “profound” nature
12 of inaccuracies. Such conclusions are properly left to the jury and based on their consideration
13 of the facts established at trial. *See, e.g., Brown*, 2020 WL 1479079, at *4 (finding Hendricks’
14 opinions that unauthorized access to credit information causes profound harm, that continued
15 complaints showed the defendants’ lack of concern, and that their sales quotas incentivized
16 access to reports without consent were conclusions “the jury may or may not come to, but they
17 do not need Hendricks’ opinions on these matters.”); *accord Reilly*, 2020 WL 3047546, at *5
18 (same). Likewise, because it falls within the province of the jury, Hendricks may not opine as to
19 RMI’s motivations, intentions, or state of mind, such as its alleged “disregard” of notice relating
20 to mixed files. *See, e.g., Santos v. Experian Info. Sols., Inc.*, No. C19-23084, 2021 WL 6144643,
21 *4 (S.D. Fla. Nov. 30, 2021) (excluding Hendricks’ testimony that defendant “knowingly
22 ‘disregarded’” procedures because it improperly opined on knowledge and motive, the
23 documents Hendricks’ referred to spoke for themselves, and because: “Speculating what
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1 Experian knew from them would be unhelpful to a jury, beyond testifying to what those facts
2 would mean to him given his past experience. But to take the next step and expressly opine what
3 Experian's state of mind or intent was goes beyond the scope of permissible expert testimony
4 under Rule 702."); *Reilly*, 2020 WL 3047546, at *5 (finding Hendricks' opinions as to a
5 purported "lack of concern" for consumer privacy or the creation of incentives to violate
6 consumer privacy laws to touch upon motivation or specific intent and to be decisions properly
7 left to the jury).

8 Hendricks next, in his sixth opinion, opines it is "standard throughout the consumer
9 reporting industry for [CRAs] such as Defendant to provide consumers with copies of their
10 reports ('full file disclosures') when requested." Dkt. 35-1 at 31. RMI argues this opinion is not
11 based on the facts and is contradicted by other evidence. *See* Dkt. 35-2, ¶7 (explaining RMI's
12 procedures for furnishing consumers with copies of reports), Dkt. 35-1 at 37-40 (summary of
13 consumer's rights provided on RMI's website), and *id.* at 41-49 (forms to request copies of
14 consumer reports). These argument are not persuasive. Again, Hendricks is qualified to offer
15 expert evidence as to these and other standard industry practices, and RMI is free to cross-
16 examine Hendricks and to challenge the weight afforded his opinion through the introduction of
17 contradictory evidence. *See, e.g., Lister v. Hyatt Corp.*, No. C18-0961-JLR, 2019 WL 6701407,
18 at *11 (W.D. Wash. Dec. 9, 2019) (citing *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010),
19 as amended (Apr. 27, 2010) ("Shaky but admissible evidence is to be attacked by cross
20 examination, contrary evidence, and attention to the burden of proof, not exclusion.") (citing
21 *Daubert*, 509 U.S. at 596)).

22 RMI did not address a follow-up sentence in the sixth opinion: "But Defendant lacked an
23 adequate mechanism or procedure to ensure that Plaintiffs were provided copies of their full file
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1 disclosures when they requested them. This reflected Defendant's disregard of long-standing,
2 well-known industry standards under which CRAs routinely provide consumers with their full
3 file disclosures upon request." Dkt. 35-1 at 31-32. However, the same reasoning expressed
4 above applies to this opinion. That is, Hendricks may offer testimony as to RMI's practices or
5 procedures only to the extent he can identify a basis for his knowledge; he may not speculate;
6 and he may not delve into RMI's state of mind.

7 Finally, in his seventh opinion, Hendricks opines "[t]he inaccurate consumer report
8 information, portraying Plaintiffs as criminals, was not only a substantial factor in their
9 application for an apartment being rejected, it was the preeminent factor." Dkt. 35-1 at 32. RMI
10 depicts this as both an improper opinion on causation, which is an issue of law in this case and
11 the province of the jury, and as sheer speculation, without any evidence in support.

12 "[A]n expert witness cannot give an opinion as to her *legal conclusion*, i.e., an opinion on
13 an ultimate issue of law." *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016
14 (9th Cir. 2004) (citation omitted; emphasis retained). However, "[e]xpert opinions are not
15 objectionable merely because they embrace an ultimate issue." *Lister*, 2019 WL 6701407, at *12
16 (citing Fed. R. Evid 704(a)). *See, e.g., Hangarter*, 373 F.3d at 1016 (expert's opinion that
17 defendants failed to comport with industry standards for claims adjustment in the context of an
18 insurance bad faith claim did not constitute a legal conclusion of bad faith: "While [the expert's]
19 testimony that Defendants deviated from industry standards supported a finding that they acted
20 in bad faith, [the expert] never testified that he had reached a legal conclusion that Defendants
21 actually acted in bad faith (i.e., an ultimate issue of law)."); *Lister*, 2019 WL 6701407, at *12
22 (expert could not opine as to fault, which was the ultimate issue of law in the case, but could
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1 testify to the foreseeability of behavior because “foreseeability is generally an issue of fact.”)
2 (citations omitted).

3 Plaintiffs allege, in relevant part, that RMI violated the FCRA “by failing to establish or
4 to follow reasonable procedures to assure maximum possible accuracy in the preparation of the
5 credit reports and credit files RMI published and maintain concerning Plaintiffs.” Dkt. 1, ¶5.2.
6 They allege that, as a result, they suffered damages, “including economic loss, damage to
7 reputation, emotional distress and interference with Plaintiffs’ normal and usual activities for
8 which Plaintiffs seek damages in an amount to be determined by the jury.” *Id.*, ¶5.3.

9 It is not clear Hendricks’ opinion – that inaccurate information in the consumer reports
10 was a substantial and the preeminent factor in the decision to reject Plaintiffs’ rental application
11 – reaches a legal conclusion. However, it is also true that expert testimony on this point is not
12 necessary to assist the jury. In fact, documents RMI submitted with its motion provide direct
13 support for this statement. Specifically, “Washington Tenant Adverse Action Letter[s]”
14 addressed to Plaintiffs advise that their applications for residency have been rejected based on
15 “Information received in a criminal record” and that that information was obtained from Straight
16 Arrow Screening, RMI’s subsidiary. Dkt. 35-1 at 2, 41-42 & 45-46. Accordingly, while
17 Hendricks may provide helpful testimony as to typical consequences of mixed files, as discussed
18 further below, he may not stray into opinion testimony as to any factor in the decision to reject
19 Plaintiffs’ rental application because the jury will have sufficient evidence upon which to make
20 that factual determination.

21 D. Damages

22 RMI argues that, as found by numerous courts, Hendricks should not be allowed to testify
23 about damages. *See, e.g., Reilly*, 2020 WL 3047546, at *4 (“Hendricks will not be permitted to
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1 testify about Plaintiff's damages, damages that he believes commonly present in privacy
 2 invasion victims, or the information gathered during his interviewing of other privacy breach
 3 victims."); *Brown*, 2020 WL 1479079, at *3 ("Hendricks is not qualified to opine regarding
 4 Plaintiffs' emotional or physical damages or the emotional and physical damages that generally
 5 arise from FCRA violations.") *See also* Dkt. 42 at 3-4.⁴ Plaintiffs contend Hendricks can offer
 6 helpful testimony as to the types of damages common to victims of credit reporting errors, the
 7 foreseeability of such harms to RMI, and that RMI is on notice of such harms. *See Sandigo v.*
 8 *Ocwen Loan Servicing, LLC*, No. C17-2727, 2019 WL 2579341, at *5 (N.D. Cal. June 24, 2019)
 9 (allowing Hendricks' testimony as to the impact of the defendant's actions on the plaintiff's
 10 credit score and creditworthiness and stating any deficiencies in his testimony could be addressed
 11 through cross examination). Plaintiffs also contend Hendricks is qualified to testify about typical
 12 consequences of false credit reports. *See FTC v. Accusearch, Inc.*, No. C06-0105 (D. Wy. Feb.
 13 5, 2007) (order denying motion to strike (Dkt. 95) at 4-5) (finding Hendricks qualified to testify
 14 "as to the harms caused or likely to be caused by the selling of a consumer's personal phone
 15 records, any countervailing benefits, and the appropriate steps to avoid or mitigate potential
 16 harm.")

17 As argued by Plaintiffs, Hendricks may offer expert testimony as to typical consequences
 18 resulting from issues with consumer reports. *See, e.g., Brown*, 2020 WL 1479079, at *3 n.2
 19 ("Hendricks is permitted to testify regarding the damage to a person's credit report that may be
 20 caused by a hard inquiry, as well as the risk of identity theft that can result from unauthorized
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22 ⁴ In their sur-reply, Plaintiffs deem impertinent RMI's citation to cases excluding Hendricks'
 23 testimony as to emotional distress damages because the expert report from Hendricks does not opine on
 24 that topic. Dkt. 46 at 2-3. Because the parties appear to more generally dispute the issue of damages-
 related expert testimony, the Court disagrees with Plaintiffs' contention.

1 access.”); *Neal v. Ford Motor Credit Co., LLC*, No. C15-3474, 2016 WL 7971447, at *2 (W.D.
2 Mo. Oct. 18, 2016) (excluding Hendricks’ testimony as to specific damages alleged, but allowing
3 his testimony as to defendant’s actions and their effect on plaintiff’s credit report, credit score, or
4 ability to obtain credit); *Williams*, 2015 WL 9690018, at *4 (excluding Hendricks’ testimony as
5 to specific damages alleged, but allowing his testimony as to the “ordinary, industry-standard
6 consequences that flow from inaccurate consumer reporting to the extent he possesses such
7 knowledge.”). His expertise extends to mixed files and, as such, any typical consequences
8 associated with mixed files.

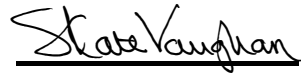
9 However, like the vast majority of courts to consider the issue, the Court finds no basis
10 for concluding Hendricks is qualified to offer opinions as to the specific damages alleged in this
11 case, including Plaintiffs’ economic loss, damage to their reputations, emotional distress, and
12 interference with their normal and usual activities. *See, e.g., Malverty*, 2019 WL 5549146, at *2
13 (observing that most courts have not allowed Hendricks to testify as to damages, finding he
14 could not opine as to whether Equifax caused Plaintiff emotional distress, and stating “any
15 opinion about the types of damages that are common to plaintiffs in comparable circumstances
16 would not assist the jury, as it will be instructed on the proper measure of damages.”) Plaintiffs
17 may themselves offer testimony as to damages and a determination as to the amount of damages
18 owed, if any, would be made by a jury. *See, e.g., Valenzuela*, 2015 WL 6811585, at *3 (finding
19 Hendricks could not opine as to damages because he “is not qualified to address physical,
20 emotional, or economic effects of an inaccurate credit report, or to estimate the value of
21 ‘expended time and energy to correct errors...in addition to loss of time and energy, loss of
22 opportunity[,]’” and that his testimony would not assist the fact-finder because the plaintiff could
23 testify on all of those subjects). *See also Anderson v. Equifax Info. Servs., LLC*, No. C16-2038,
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1 2018 WL 1542322, at *5 (D. Kan. Mar. 29, 2018) (finding the foreseeability of damages a
2 factual issue within the understanding of a lay juror and that the plaintiff failed to show how
3 Hendricks' opinions would be helpful to the damages determination).

4 CONCLUSION

5 RMI's Motion to Exclude, or Limit, Proffered Testimony and Report of Evan D.
6 Hendricks, Dkt. 35, is GRANTED in part and DENIED in part. Hendricks may offer expert
7 evidence in this case consistent with the rulings set forth above. To the extent Plaintiffs intend to
8 offer an amended expert report consistent with the Court's ruling, it may do so within **fourteen**
9 **(14) days** of the date of this Order. Defendants may, within **twenty-eight (28) days** of the date
10 of this Order, submit a rebuttal expert report.

11 Dated this 22nd day of June, 2022.

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13 S. KATE VAUGHAN
14 United States Magistrate Judge
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